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Supreme Court, U.S.
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No. 99-783

IN THE

Supreme Court of the United States

DONALD R. BUCHANAN,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Washington's Supreme Court, following the Supreme Courts of Idaho and Montana, correctly interprets the right to hunt on open and unclaimed land as permitting hunting both on ceded land and on land traditionally hunted by the tribe?

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STATEMENT OF THE CASE

On January 6, 1995, Donald Buchanan was stopped by wildlife enforcement officers for hunting on land owned and managed by the State of Washington in the eastern part of the state. He possessed two dead five-point, branch-antlered bull elk while his state hunting license was revoked and elk season closed.

Buchanan lives in Kent, Washington, a Seattle suburb west of the Cascade Mountains. He is an enrolled member of the Nooksack Indian Tribe. The Nooksack reservation is in Whatcom County — west of the Cascade Mountains and Washington's tribe nearest the Canadian border. The lands ceded to the United States by the Nooksack Tribe under the Treaty of Point Elliott are bordered on the east by the summit of the Cascade range. Thus, Buchanan hunted on the other side of the Cascade Mountains from his tribe's ceded land and from his home. *See* App. A.

The State charged Buchanan with possessing big game during closed season and hunting while his license was revoked. He moved to dismiss claiming the State's regulations do not apply to him because he has the treaty right to hunt on open and unclaimed lands. He alleged the only regulations governing tribal hunting on open and unclaimed lands are Nooksack tribal regulations.

The trial court dismissed the charges and ruled the treaty gives tribal members a right to hunt anywhere in the "Territory of Washington." The Court of Appeals affirmed. The State appealed. Washington's highest court unanimously held these hunting rights are geographically available in the ceded territory and may include other areas if they are proven

to have been actually used for hunting and occupied by the Nooksacks over an extended period of time.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

The Washington Supreme Court followed case precedent when it interpreted the Indian right to hunt on open and unclaimed land as the right to hunt on ceded land and on traditional tribal hunting grounds.

A. The geographic scope of the Nooksack right to hunt on open and unclaimed lands cannot be determined from the treaty language alone. The context in which the treaty arose must also be examined in order to determine the parties' intent.

Buchanan claims the treaty language granting Indians the right to hunt open and unclaimed land has no geographic limitation. Case precedent holds otherwise. "Open and unclaimed" is defined by case law as the right to hunt off-reservation on all state and federally-owned land except federal parks. *See State v. Miller*, 102 Wn. 2d 678, 680 at n.2, 689 P.2d 81 (1984) (citations omitted).

It is a well-accepted fact that Indian treaties are "not a grant of rights to the Indians, but a grant of rights from them, — a reservation of those not granted." Bradley I. Nye, *Where Do the Buffalo Roam? Determining the scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest*, 67 Wash. L. Rev. 175, 187 (1992), *citing United States v. Winans*, 198 U.S. 371, 381 (1905).

Even before *Winans*, however, this interpretation of the meaning of treaties was expressed in a Washington territorial case, *United States v. Taylor*, 3 Wash. Terr. 88, 13 P. 333 (1887) (App. B); Felix S. Cohen, *Handbook of Federal Indian Law*, at 444 n.20 (1982). The reservation of rights has been followed continually since in cases such as *Seufert Bros. Co. v. United States*, 249 U.S. 194, 199 (1919) (hereafter *Seufert Bros.*); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 679-81 (1979) (hereafter *Fishing Vessel*); Cohen, *supra*, at n.21; and Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe*, 34 Idaho L. Rev. 435, 447-48 (1998).

Consistent with prior case law, the Washington Supreme Court applied the doctrine of reserved Indian rights to determine the meaning of "open and unclaimed" in Buchanan's case. Justice Guy observed certain tribal rights, such as hunting and fishing rights, have belonged to the Indians from time immemorial. A treaty documents a grant of some rights from the tribe to the federal government; however, those rights not expressly ceded in the treaty, as well as those expressly reserved, remain with the tribe. *State v. Buchanan*, 138 Wn. 2d 186, 203, 978 P.2d 1070 (1999), *citing* Dana Johnson, *Native American Treaty Rights to Scarce Natural Resources*, 43 U.C.L.A. Law Rev. 547, 552 (1995).

The *Buchanan* court also recognized the reservation of rights doctrine has consistently been applied to the fishing and hunting provisions of the Stevens Treaties at issue here. *State v. Buchanan*, 138 Wn. 2d at 203, *citing as examples Fishing Vessel* and *Seufert Bros*. Thus, consistent with prior cases, *Buchanan* analyzed the geographic scope of the

Nooksack hunting right *first* in light of the long-standing reservation of rights doctrine. Again as in many prior cases, the court then applies the other rules of treaty interpretation.

The *Buchanan* court held the Nooksacks reserved the right to hunt on open and unclaimed ceded land, together with the right to hunt their traditional grounds. The court's analysis is consistent with over a hundred years of precedent. The *Buchanan* court asked the two basic questions of treaty interpretation: what rights did the tribe reserve and what did the parties intend by "open and unclaimed"? The court then applied the principles of treaty construction, such as construing ambiguous language in a manner non-prejudicial to the Indians, to decide the scope of off-reservation hunting rights. *Buchanan* decided the Nooksacks may hunt off-reservation on their ceded and traditionally hunted lands. This analysis is consistent with both precedent and the well-established rules of treaty construction.

Petitioner argues *Buchanan* erred because the plain language of the treaty controls. This ignores the "well-accepted fact" of the reservation of rights doctrine and erroneously views the treaty as simply a contract. *See* Nye, *supra*, at 187. Although the goal of treaty interpretation is the same as the goal of contract interpretation (determining the intent of the parties), the analysis of the parties' intentions begins with the language of the treaty and the *context* in which the written words are used. *Buchanan*, 138 Wn. 2d at 201-02, *citing Fishing Vessel* and *United States v. Washington*, 157 F.3d 630 (1998), *cert. denied*, 119 S. Ct. 1377 (1999) (emphasis added).

The *Buchanan* court then applied the established rules of treaty construction to interpret the parties' intent. Initially, and contrary to Petitioner's claim, the treaty must

"be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Buchanan, supra, citing Fishing Vessel* (internal citation omitted) and *State v. Miller*, 102 Wn. 2d 678, 683 (1984).

Next, the *Buchanan* court observed, where there is ambiguity in the language of the treaty, it must not be construed to the prejudice of the Indians. *Buchanan*, 138 Wn. 2d at 202, *citing Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (hereafter *Mille Lacs*) (additional citations omitted). However, courts may not ignore treaty language that, viewed in its historical context and given a fair appraisal, clearly runs counter to the tribe's claims. *Buchanan, supra, citing Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985); *Department of Ecology v. Yakima Reservation Irrigation District*, 121 Wn. 2d 257, 277, 850 P.2d 1306 (1993). Additionally, treaties must be construed liberally in favor of Indians. *Buchanan, supra* (citations omitted).

Petitioner claims because the plain language of the treaty does not geographically limit off-reservation hunting to ceded or aboriginal lands, no geographic limit except the "Washington Territory" exists. Again contrary to precedent, Petitioner disregards reserved rights. He errs because the "doctrine" has been a well-accepted fact in Northwest treaty construction since before Washington became a state.

Lastly, with respect to rules of construction, Petitioner claims the Washington Supreme Court failed to broadly interpret the Treaty of Point Elliott in favor of the Indians. Petitioner is correct that treaties must be broadly construed

in favor of Indians. *Buchanan* in fact construes the treaty provision broadly in the tribe's favor.

Buchanan interprets "open and unclaimed" as *adding* aboriginal lands to ceded lands as areas available for Nooksack off-reservation hunting. In doing so, the court favors the Indians by increasing the area they may hunt off-reservation. This expanded geographic scope benefits tribes and is consistent with principles of treaty construction and case precedent. Because the decision is consistent with precedent, certiorari is unnecessary. However, if review is granted, the better analysis is that tribes should not be allowed to hunt outside their reservations since there are no longer any "open and unclaimed" lands as that term was understood by the Indians. *Ward v. Race Horse*, 163 U.S. 504 (1896); *Crow Tribe of Indians and Thomas Ten Bear v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1851 (1996).

B. Washington's Supreme Court determined the scope of off-reservation hunting rights consistent with the Idaho and Montana Supreme Courts.

The Idaho Supreme Court previously analyzed the scope of off-reservation treaty hunting rights in the landmark case of *State v. Arthur*, 261 P.2d 135 (Idaho 1953), *cert. denied*, 347 U.S. 937 (1954). In *Arthur*, a tribal member hunted on a National Forest Reserve. The court analyzed the treaty language "open and unclaimed land" by asking what this phrase meant to the parties when they signed the treaty, and what rights was the phrase intended to reserve. Nye, 67 Wash. L. Rev. at 183, *citing Arthur*, 261 P.2d at 183. The court held the treaty right is a reserved right "to hunt upon open and unclaimed land . . . at any time of the year in any of the lands ceded to the federal government though such lands

are outside the boundary of their reservation." *Arthur*, 74 Idaho at 265; *Buchanan*, 138 Wn. 2d at 206.

More recently, in *State v. Coffee*, 556 P.2d 1185, 1189 (1976), the Idaho Supreme Court again analyzed off-reservation hunting rights by examining reserved rights. The court observed treaties are reservations of aboriginal rights, and both the signatory tribes and the federal treaty negotiators understood that rights of access would be limited to traditional hunting grounds which remained "open and unclaimed" or "unoccupied." Nye, *supra*, at 190, *citing Coffee*, 556 P.2d at 1188.

In addition to Idaho, the Montana Supreme Court analyzes treaty hunting rights with reference to the Indians' reserved rights. Montana's highest court explicitly follows Idaho and concludes hunting and fishing rights under similar treaty language are "part and parcel with aboriginal title" using the reservation of rights analysis. *State v. Stasso*, 172 Mont. 242, 563 P.2d 562, 563 (1977), *citing Coffee*, 556 P.2d 1185. *Stasso* concludes the Indians, at the time of the treaty, reserved the right to hunt on open and unclaimed lands outside their present day reservation, but within their aboriginal hunting territory. *Stasso*, 563 P.2d at 564.

Thus, *Buchanan* relies on the reservation of rights doctrine to determine the geographic scope of off-reservation hunting, consistent with the sister states of Idaho and Montana. The Washington Supreme Court concludes, consistent with precedent, that "open and unclaimed" means treaty tribes may hunt their ceded and traditional hunting areas. Because the decision is consistent with precedent, certiorari is unnecessary.

C. This case does not conflict with federal precedent.

Petitioner contends two federal decisions conflict with the Washington Supreme Court: *Mille Lacs* and *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (hereafter *Boldt*). Neither conflicts with *Buchanan*.

Landowners and counties in *Mille Lacs* argued the Wisconsin Bands do not hold usufructuary rights in the Minnesota portion of the *ceded* territory because none of the Wisconsin Bands used and occupied the area at treaty times. *Mille Lacs* does not conflict with *Buchanan* because the right to hunt non-ceded land was at issue in *Buchanan*.

As noted, because Buchanan hunted on land hundreds of miles from his tribe's ceded lands, the court had to determine if he had any *other* right to hunt in the area. Aboriginal right, if proven by prior use, is distinct from the right to hunt on ceded lands since the two areas, as in this case, may differ geographically. *Mille Lacs* rejected attempts to limit tribal hunting on ceded land to land that was also traditional hunting ground. *Buchanan* did not decide this issue; thus, it is consistent with *Mille Lacs*.

Nor does *Buchanan* conflict with *Boldt* or the shellfish cases. Petitioner contends these cases hold the reservation of rights doctrine may not be used to limit off-reservation hunting rights for treating Indians. Petitioner fails to recognize these cases interpret the treaty right to fish rather than the right to hunt.

The rights differ in scope and intended duration. The treaty fishing right reserved in the Stevens Treaties has been

interpreted to provide a broad right to fish outside ceded lands in all usual and accustomed fishing areas, and, more importantly, the right to fish is interpreted as a permanent one, unless abrogated by Congress. *Buchanan*, 138 Wn. 2d at 104 *citing Boldt* and *Fishing Vessell.*

In contrast, the treaty hunting right, by its terms, is of a temporary and self-limiting nature. The right was intended to diminish as lands became settled, without the need of congressional action. *Buchanan*, 138 Wn. 2d at 105, *citing United States v. Hicks*, 587 F. Supp. 1162, 1164 (W.D. Wash. 1984) as an example.

Even if Petitioner accurately states the holdings of *Boldt* and the shellfish cases, they do not apply to *Buchanan*. *Boldt* and the shellfish cases address the permanent right to fish under the Stevens Treaties. *Buchanan*, on the other hand, addresses the temporary treaty right to hunt.

Petitioner's argument also fails because *Buchanan* used the reservation of rights doctrine to expand, not limit, off-reservation hunting. It has been clear in Washington for some time Indians may hunt on open ceded land. The question in *Buchanan* is whether a tribal hunter may also hunt on non-ceded land. The Washington Supreme Court decided the treaty Indians' reserved rights give Buchanan a different, additional basis for exercising his hunting rights on non-ceded land: aboriginal title, to be proven by the Nooksack's prior use of this land for hunting.

Because *Buchanan* uses reserved rights to expand, not limit, the geographic scope of tribal off-reservation hunting, its holding is consistent with *Boldt* and the subsequent shellfish litigation decisions of the federal courts.

II. CONFUSION WILL ONLY ARISE IF THE WASHINGTON SUPREME COURT'S DECISION IS DISTURBED

Finally Petitioner claims review should be granted because *Buchanan* has caused confusion. The argument is without merit.

The only demonstrated confusion over the scope of off-reservation hunting rights resulted from the superior and lower appellate court opinions in this case. Those courts erroneously held off-reservation hunting could occur anywhere within the "Washington Territory."

This holding created great confusion because it was contrary to precedent and to the understanding of many tribes. As stated in Petitioner's Appendix at 18:

> The new court ruling upset traditional territorial agreements among tribes and opened hunting to competition and intertribal rivalry . . .
>
> One of the intertribal conflicts involves tribes such as the Yakama Nation, whose former ceded area include healthy, huntable elk herds.
>
> Those tribes fear the new interpretation of the treaties will mean their elk herds will be overhunted by urban tribes from the Puget Sound area whose own hunting lands have been paved over.

The Tacoma News Tribune, May 27, 1998, Rob Carson; Petitioner's Appendix at I5-I10.

Petitioner argues the sole geographic boundary for off-reservation hunting rights is the "Washington Territory." The only confusion created in this case came when the lower courts adopted Petitioner's argument. The Washington Supreme Court has cleared the confusion and returned off-reservation hunting rights to the relative clarity created by earlier state and federal cases.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — MAP

Representation of Tribal Ceded Areas and
WDFW Game Management Unit (GMU) Boundaries

DRAFT

Tribal Area

- Non-treaty
- Nez Perce
- Yakama
- Point Elliott
- Point No Point
- Yakama/Nez Perce
- Medicine Creek
- Quinault
- Makah
- Umatilla Walla Walla
- Medicine Cr./Pt. No Point
- National Parks

Treaty Boundary Interpretations

- WDFW 1999 Interpretation
- DNR 1964 Version
- DOE 1998 Version

ABOUT THE MAP

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MILES
Map Scale - 1:764392
MAP PROJECTION
State Plane South
NORTH AMERICAN DATUM - 1927
Produced : August 23, 1999

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APPENDIX B — *UNITED STATES v. TAYLOR*, 3 Wash. Terr. 88, 13 P. 333 (1887)

[Decided January 25, 1887]

UNITED STATES AND OTHERS

v.

FRANK TAYLOR.

INDIANS — RIGHT TO FISHERIES — TREATY OF JUNE 9, 1855 — INJUNCTION. — Under the treaty of the United States with the Yakima tribe of Indians, entered into June 9, 1855, conferring on them the right of taking fish at all usual and accustomed places, in common with the citizens of Washington Territory, etc., the privilege is reserved to them to enjoy all the fisheries they had theretofore enjoyed; and when a person, under an act of Congress passed subsequently to the treaty, obtained a patent for homestead land abutting upon the Tum Water fishery, and erected and maintained a fence thereon, which obstructed the approaches to the fishery, and prevented the enjoyment by the Indians of the right which had been so reserved to them, equity will interfere by injunction and cause the removal of the obstruction.

APPEAL from the District Court holding terms at North Yakima. Fourth District.

The complaint sets forth that the Yakima tribe of Indians, with confederated tribes, formerly owned and occupied a large area of land, embracing within its scope what are now the several counties of eastern Washington Territory; that

the Columbia River flowed through their domain; that this river abounded in salmon, a fish upon which, from time immemorial, the tribe of Indians had largely subsisted; that while the fish were used by all, to many members of the tribe they constituted an indispensable article of food; that from traditional times, these fish had annually entered the Columbia River from the sea, and gathered in great numbers at a few certain places or fisheries, the principal and most important of which was the one mentioned; that this fishery was within the country of these confederated Indian tribes, and to it the members of the tribes had been accustomed to go during the fishing season, and upon the adjacent river banks found a temporary home for themselves and families, pasturage for their ponies, and places to land and cure the fish which was preserved for winter use. The complaint alleges the making and conclusion between the confederated tribes and the United States of the treaty of June 9, 1855, ratified by the Senate March 8, 1859; that in consideration of certain annuities and compensations, made by the government to the Indians, they had ceded to the United States most of their country, and made concessions relative to rights of way and public highways across that portion of land they retained as their permanent reservation; that certain other rights and privileges were by the Indians expressly reserved; among which were the following: "The right of way with free access from the same [their reservation] to the nearest public highway, ... and also the right, in common with the citizens of the United States, to travel upon all public highways; . . . . the exclusive right of taking fish in all streams where running through or bordering said reservation, ... as also the right of taking fish at all usual and accustomed places, in common with the citizens of the

territory, and of erecting temporary buildings for curing them."

The complaint also sets forth, that by reason of the nature of the banks of the river the approach to the fishery was limited to certain defiles, or passage-ways; that at the time of the conclusion and ratification of the treaty, said Indians were so using and enjoying said fishery, and continued such use and enjoyment long thereafter, and until prevented by Taylor; that Taylor had fenced in the land bordering the river in front of the fishery over which the Indians were accustomed to pass in going to and from the fishery, and upon which they landed fish, erected their curing-houses, made their temporary abodes during the fishing season, and upon which they pastured their animals. The fishery is perhaps fifty or seventy-five miles or more distant from the reservation. The complaint averred that the Indian plaintiffs were old men, and through life looked to this source of supply for necessary food, and if deprived of it would perish. The plaintiffs prayed for an injunction, etc., and other equitable relief.

By his answer the appellee admits the making and ratification of said treaty, and the inclosing of said land by a fence, upon a portion thereof, over which said Indians had been accustomed to travel in going to and from said fishery; that there was no fence built upon the side next to the river, the river itself being the only means of inclosure on that side; but avers that he had the right, as owner in fee of said land, to thus inclose the same to protect his crops growing thereon, notwithstanding said treaty. Appellants replied, and the cause was tried upon these pleadings, and upon the facts

as stipulated in a statement agreed to by all parties, which is fully set forth in the opinion of the court. Findings and judgment for defendant, and plaintiffs appealed.

Mr. W. H. White, United States Attorney, and *Mr. John B. Allen,* for the Appellant.

A treaty entered into by the United States constitutes a part of the supreme law of the land, and is as much a part of the local law of Washington Territory as a statute lawfully enacted by its legislature. (*Ware* v. *Hylton,* 3 Dall. 236; *Hauenstein* v. *Lynham,* 100 U. S. 483.) When a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. (*Shanks* v. *Dupont,* 3 Pet. 242; *Hauenstein* v. *Lynham,* 100 U. S. 487.) That construction of a treaty should be taken as the true one which has been adopted and acted upon by the parties to it. (*United States* v. *Payne,* 8 Fed. Rep. 892.) While the rule obtains generally of giving to treaties the most liberal construction, with a view of effecting the objects of the parties to them, it has a peculiar and special application in case of such a treaty as the one brought to the court's attention. This is a treaty made by a powerful, enlightened, and Christian nation, with ignorant and barbarous tribes who occupy toward that nation the anomalous attitude of a high contracting party, and at the same time that of a ward. The treaty is framed in the tongue of the civilized nation. For the aptness and adequacy of its language to protect their reserved rights as well as to cede their country, the Indians were not only dependent upon the nation with whom they dealt, but even for the interpretation and construction of that language. The court should not

hesitate, therefore, to give the most extended meaning to the language employed, to prevent the treaty being construed to the prejudice of the Indians. (*Worcester* v. *Georgia,* 6 Pet. 582; *The Kansas Indians,* 5 Wall. 760.) It may be true that an act of Congress may repeal a treaty. In such case, however, there are peculiar reasons for applying the rule with great strictness. (*Taylor* v. *Morton,* 2 Curt. 454; *The Cherokee Tobacco,* 11 Wall. 621.) It is not within the power of the courts or an executive officer of the government to contravene the provisions of this treaty. To each it is the supreme law of the land. It would not be within the power of the government, in the issuance of a patent, to deprive these Indians of a treaty right secured them. If the right of fishery claimed in this case was reserved to the Indians by treaty stipulation, Taylor and his grantors are charged with knowledge of the same. In short, the reservations of this treaty are in effect imported into the patent. (*The Peggy,* 1 Cranch, 109, 110.)

Mr. William Lair Hill, and *Mr. F. P. Mays,* for the Appellee.

By the common law, in the absence of governmental restriction, citizens have the right to take fish in the navigable streams, not at some particular places, but generally. But this right is subject to regulation by the government within whose local jurisdiction the streams lie. (*Coolidge* v. *Williams,* 4 Mass. 140; *Commonwealth* v. *Chapin,* 16 Am. Dec. 386.) A treaty, however, is under our system of government the "supreme law," — supreme in so high and broad a sense that no state or territorial government, nor any power short of the treaty-making power of the Congress of

the United States, can abrogate it. By this treaty it was intended that neither the territory nor future state of Washington should have the power, in the exercise of the right to regulate fishing in its great streams, to deny to these Indians the same privileges enjoyed by citizens. It might, for protection against extermination of fish, restrict the fishing to certain times, places, and methods, or, but for the treaty, it might, as governments have often done, altogether exclude all persons not citizens from fishing in its waters; but under this treaty the power to exclude the Indians (who are not citizens), or to deny to them any substantial rights of fishing, which are not denied to the citizen, is taken away in advance; and the Indians are further secured in the right to erect temporary buildings for curing fish, — a right not enjoyed by citizens under the common law. (*Coolidge* v. *Williams, supra; Cortelyou* v. *Van Brundt,* 3 Am. Dec. 439.) This right to go on the shore, upon the land of the defendant, to *cure* fish, cannot be extended by construction to include any other right upon the land. It is a right in derogation of his right to the exclusive possession of his land, as the owner in fee, and must be strictly confined within the prescribed limits. (*Taylor* v. *Hampton,* 17 Am. Dec. 710.) The right, *in common with citizens,* to take fish, implies neither the right to occupy defendant's land for the purpose of *catching* fish, nor the right to go over and upon his *other* lands, in traveling to and from the river; for that is not specified in the treaty, nor is it included in the right of fishing held in common with citizens. Citizens have no rights on the lands of defendant. (*Coolidge* v. *Williams, supra; Cortelyou* v. *Van Brundt, supra.*) The Indians have the right to go to the places where they have a right to fish in the river, and to go upon the shore to cure their fish. But this is a right arising out of

necessity, not a right specified in the treaty; and the necessity of trespassing upon defendant's land, either for taking fish or for approaching the shore, does not exist. The river being navigable, and by that fact a public highway, the Indians must use that as a means of approach. (*Turnbull* v. *Rivers,* 15 Am. Dec. 622.) The right of the defendant to build and maintain the fence is unquestionable. The treaty expressly secures to the Indians the right to travel upon the public highways of the territory. So they have a perfect means of approach, by the common highways, to the navigable streams, and by the navigable streams to the places where they desire to take and cure fish. Defendant, in the stipulated statement of facts, has admitted that the fishery in question is one of the "ancient, usual, and accustomed fisheries" referred to in the treaty. This admission in the written stipulation is merely a mistaken admission as to the contents and meaning of a law, and does not conclude this, no matter when made, from insisting upon the application of the law as it is, and in its true meaning. (*Brewster* v. *Striker,* 2 N. Y. 19; *Chatauqua County Bank* v. *White,* 6 N. Y. 253.) The treaty is so modified by the homestead law, subsequently passed, under which defendant obtained title, that all rights of the Indians upon the lands along the navigable rivers cease as to any particular tract, whenever the land is granted, under the law, to an individual. The treaty is the supreme law in no higher sense than an act of Congress is the supreme law. It may be abrogated by an act of Congress. A subsequent act of Congress in conflict with its provisions repeals it *pro tanto* by implication, just as if it were a previous act of Congress instead of a treaty. (*Foster* v. *Elam,* 2 Pet. 314; *The Cherokee Tobacco,* 11 Wall. 621.)

Appendix B

Mr. Justice HOYT delivered the opinion of the court.

This suit was brought by the United States, R. H. Milroy, as Indian agent, and several Indian plaintiffs, for themselves and for the Yakima nation or tribe of Indians, of which they are alleged to be members, to restrain the appellee, Frank Taylor, from maintaining a fence around a large body of land abutting upon Tum Water fishery in the Columbia River, which fence the complaint alleges obstructs the land approaches to said fishery, and thus prevents the whole enjoyment thereof claimed by said Indians under their treaty with the United States, entered into June 9, 1855, and ratified by the Senate of the United States March 8, 1859. By his answer the appellee admits the making and ratification of said treaty, and the inclosing of said land by a fence upon a portion thereof over which said Indians had been accustomed to travel in going to and from said fishery; that there was no fence built upon the side next to the river, the river itself being the only means of inclosure on that side; but avers that he had the right, as owner in fee of said land, to thus inclose the same to protect his crops growing thereon, notwithstanding said treaty.

Appellants replied, and the cause was tried upon these pleadings. There are other issues raised by the pleadings, but they are immaterial on this appeal, under the stipulation upon which the decree was given, from which this appeal is prosecuted. The stipulation referred to is as follows: —

"1. That the treaty mentioned in the complaint in this action was made and concluded as therein alleged, and that the plaintiffs are members of the Yakima tribe or nation of

Indians, as alleged in the complaint. 2. That prior to and at the time of entering into said treaty, the Tum water fishery, mentioned and described in the pleadings was one of the ancient, usual, and accustomed fisheries of said Yakima tribe or nation of Indians, and referred to in said treaty; was used and enjoyed as such by the Indians of said tribe in the manner in the complaint alleged, and continued to be so used and enjoyed therefor, except as hereinafter stated, and that said Indian plaintiffs as members of said tribe or nation so used and enjoyed the same. 3. That subsequent to the conclusion and ratification of said treaty, and before the commencement of this action, the said defendant, Frank Taylor, and his several grantors, obtained patents from the United States to the lands in the complaint and answer described, under the homestead, pre-emption, and other land laws of the United States, and said Taylor is still the owner thereof. 4. That said lands extend to and border upon the Columbia River at the site of said fishery, and are the same lands over and upon which said Indians have heretofore been accustomed to go and return from said fishery, and upon which they had landed and cured the fish taken by them from said fishery, and where they have been accustomed, during the fishing season, to make their temporary abode and pasture their ponies. 5. That since his acquirement of said land, said Frank Taylor, as owner thereof, has caused the same to be inclosed by lawful fences for the purpose of utilizing the same for agricultural purposes, thereby preventing said Indians from entering upon the same, as before they had been accustomed to do, under the claim that the United States, by means of the said grants, invested him and his said grantors with absolute title to said lands, and the exclusive right to use the same. 6. That upon these facts we submit to the court whether the defendant is

entitled to a decree dismissing plaintiff's bill. If the decision of the court should give the defendant the right to exclude the Indians referred to in the complaint from his said lands, the cause is to be dismissed and judgment entered for defendant; but if the court decides that said Indians are entitled to access over the lands of defendant to said fishery, then the cause shall proceed upon testimony to be taken as to the conduct of defendant complained of, in order to determine what relief shall be granted therein."

From the above stipulation, it will at once be seen that the single question now to be determined is that of the rights of the appellants under said treaty as against the appellee, as owner of the land by title acquired from the United States subsequent to said treaty under the homestead laws and other acts of Congress.

The portion of said treaty under which appellants claim their right to relief herein is as follows: "The exclusive right of taking fish in all streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

Both parties invoke the aid of the rule laid down by the Supreme Court of the United States, that a treaty of this kind is to be liberally construed in favor of the Indians, and that in so far as the language used will allow, that construction

will be adopted which will best subserve the object which the Indians at the time the treaty was made would have been most likely to have desired and understood. We must then investigate the treaty in question in the light of this rule. The appellants contend that this clause was a reservation from the force and effect of other portions of the treaty of certain rights therein specified, while the appellee insists that it should be construed as a specific grant of rights by the United States. We think the contention of the appellants must prevail, as it seems to us that the Indians in making the treaty would have been more likely to have intended to grant only such rights as they were to part with, rather than to have conveyed all, with the understanding that certain were to be at once reconveyed to them. What did the Indians intend to reserve to themselves by the words, "as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory"?

It will be seen by the statement of facts above set out that at the time this treaty was made there existed within the territory which was the subject-matter of the treaty certain ancient fisheries which had for generations been used as such by said Indians, who had certain well-defined habits and methods connected with such use. And it is contended on the part of appellant that the effect of the words above quoted was to reserve to the Indians the right to enjoy all of these fisheries as they had heretofore.

While on the other side it is claimed that the liberal interpretation of the words in the interest of the Indians would make them apply, not to any particular places of fishing then in use, but to all places which in the future might become

usual and accustomed places of fishing, and that as to such places they had the same rights as other citizens, and in addition thereto, the right to use the shore for the purpose of curing their fish.

Many arguments can be and have been made in favor of each of these positions. But when we take into consideration the facts disclosed by this record, and the further fact, which the court knows as a matter of common knowledge, that these Indians were always tenacious in adhering to past customs and traditions, we think the contention of appellant must prevail, as we think it much more natural that these Indians should have desired to preserve as fully as possible a right then and for a long time before enjoyed by them, rather than to have provided for a right to be enjoyed in unknown ways and under new conditions, even although such new rights might possibly be of more avail than the old; besides, the construction contended for by appellee would make the right to use the shore for the purpose of erecting houses and drying fish a servitude imposed upon all the shore line of the territory, so that every person occupying the same would be liable to have his occupancy disturbed by such floating servitude, though at the time he purchased, the water in front of the land had never been a place used for taking fish. And it seems to us that this servitude would, when viewed from the standpoint of the United States as a contracting party, have been much more objectionable than the other one, though in the minds of the Indians, as the other contracting party therein, old places and methods would doubtless seem, and would probably be, to them of much greater value. The appellee further claims that even if the above position is correct, and the Indians were entitled by said treaty to the

rights claimed, still that such rights do not now exist as against the defendant, as by the act of Congress subsequently passed, under which he has taken this land, such treaty has, as to him, been repealed; but with this position we cannot agree, as these laws simply authorize the appropriation by the settler of unappropriated lands, and only authorize the extinguishment of the title which the government holds at the time of the appropriation. And if the land selected by the settler has at such time any servitude or easement impressed upon it, he takes subject thereto.

It follows from what has been said, and from the agreement of the parties, that the judgment of the District Court must be reversed, and the cause remanded for further proceedings in accordance with such stipulation and this opinion.

GREENE, C. J., and LANGFORD, J., concurred.